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Nos. 90-1262, 90-1266

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF ARKANSAS, et al.,
Petitioners,
v.
STATE OF OKLAHOMA, et al.,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY
Petitioner,
v.
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Respondents.

BRIEF OF THE STATE OF COLORADO AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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The State of Colorado respectfully submits this brief as amicus curiae in support of petitioners and urges this Court to reverse the decision by the United States Court of Appeals for the Tenth Circuit in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

[1] This *amicus* brief is submitted by the Colorado Attorney General on behalf of the State. Pursuant to Supreme Court Rule 37.5, the consent of the parties to the filing of this brief is not required.

INTEREST OF THE AMICUS CURIAE

The State of Colorado is unique in its geographic placement in the United States. Seven major rivers have their headwaters within the mountains of Colorado. The water diverted for use in Colorado is used and reused many times over from the time it collects into the streams and rivers of Colorado until it reaches a point of destination in the ocean. Colorado is upstream of 18 states and an undetermined number of Indian tribes which may seek to promulgate water quality standards. Colorado has a keen interest in assuring the continued availability of clean, healthful water both for the use of its citizens and visitors and for the use of the rest of the downstream states.

Colorado strongly supports the concepts and goals expressed in the Clean Water Act ("CWA") and its amendments.[2] However, the State of Colorado believes that the CWA provides the framework for resolving interstate differences with respect to water quality through negotiation of interstate agreements and compacts as specifically provided for by the CWA, § 103.[3] The ruling of the Tenth Circuit Court of Appeals in no way furthers the goals and interests mandated by the CWA, but instead frustrates the amicable and cooperative solution of interstate water quality matters by pitting upstream and downstream states against each other. Colorado is

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[2] For the purposes of this brief, the Federal Water Pollution Control Act, as amended by the Water Quality Act of 1987 and as codified at 33 U.S.C. §§ 1251-1387, shall be referred to as the Clean Water Act or "CWA."

[3] 33 U.S.C. § 1253.

concerned that if this decision is upheld, the implementation of the CWA may result in inconsistencies with interstate compacts allocating water quantity, prohibitions on economic activity in upstream states that would result in impermissible burdens on interstate commerce, and chaos in the water quality planning process.

For these reasons, the State of Colorado has a compelling interest in the issues presented by this case and respectfully urges this Court to reverse the decision of the Tenth Circuit.

SUMMARY OF THE ARGUMENT

The Clean Water Act does not contemplate that states will resolve basic issues related to interstate water quality in the context of an individual discharge permit, but rather through interstate agreements and compacts involving all affected and interested states. The CWA directs the Administrator of EPA and the states to work cooperatively to resolve interstate issues, which could include numeric standards, classifications, waste land allocations and regional wastewater treatment planning, among others.

The Tenth Circuit erred by determining that EPA has no discretion in how downstream state water quality standards are implemented in an upstream discharge permit, and by substituting its interpretation and implementation of the Oklahoma water quality standards for that of EPA. The CWA is designed to permit states to determine the beneficial uses of water within their

boundaries and to apply standards which protect such uses.[4] These water quality standards are reviewed by EPA against the goals and requirements of the CWA, and if consistent with the federal act, are approved by EPA.[5] When EPA, or a state implementing an EPA-approved permit program, considers issuing or renewing a discharge permit, it is these state-determined and EPA-approved standards which must be met.[6]

The statute provides a mechanism by which another state may be heard as to its concerns with a proposed permit.[7] Congress has established EPA as the arbiter in determining whether a downstream state's concerns are valid and compelling, in those instances where compliance with water quality standards is raised in the context of a specific permit. Where, as in the case at hand, EPA determines after proper process and consideration that no adverse impact will result to the downstream state, the Court may not substitute its judgment for that of EPA.[8] Section 402 is not intended as the forum for resolution of broader water quality issues, nor as an opportunity for one state to exercise unilateral veto over all discharges in an upstream state.

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[4] CWA §§ 101(g), 303.

[5] CWA § 303.

[6] CWA § 401(a)(1).

[7] CWA §§ 402(b), 401(a)(2).

[8] *EDF v. Costle*, 657 F.2d 275 (D.C. Cir. 1981).

Further, the Tenth Circuit's judicial expansion of the statutory mandate of the CWA to allow unilateral power of one state over the granting of any and all permits in another state, as it has ruled here, has the potential to foreclose all future development of public and private facilities in upstream states, an impermissible interference with interstate commerce. Such a result is not an accurate reflection of either the language of the CWA or the intent of Congress.

The State of Colorado concurs with the arguments made by Amici States Nevada, et al., in their brief. Colorado believes certain additional arguments have not been articulated for the Court by other parties and will focus its brief on those issues.

ARGUMENT

I. THE CLEAN WATER ACT ENCOURAGES AND MANDATES COOPERATION, NOT CONFRONTATION, AMONG THE STATES REGARDING MATTERS OF INTERSTATE WATER QUALITY.

Section 101 (b) of the CWA states the policy of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Chapter . . . ."

Section 101 (g) of the CWA further provides that "[i]t is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Chapter. It is the further policy of Congress that nothing in this Chapter shall be construed to supersede or abrogate rights to water which have been established by any State . . . ."

It is clear from these sections that Congress intended for the states to exercise responsibility for achieving the goals of the Act, and that the water quality goals of the Act are not to abrogate or impair the water quantity framework of the states, including the interstate compacts approved by Congress which control the allocation of a portion of the water which originates in the State of Colorado.

That Congress did not intend the adversarial position among upstream and downstream states which will result from the Tenth Circuit ruling is clear from another section of the CWA. Section 103 provides as follows:

> Sec. 103. (a) The Administrator shall encourage cooperative activities by the States for the prevention, reduction, and elimination of pollution, encourage the enactment of improved and, so far as practicable, uniform State laws relating to the prevention, reduction, and elimination of pollution; and encourage compacts between States for the prevention and control of pollution.
>
> (b) The consent of the Congress is hereby given to two or more States to negotiate and enter

> into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts. No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by the Congress.

(Emphasis added)

Thus, the mandate of Congress is not for states to use the discharge permitting process as an arena for resolving water quality disagreements and not to permit a downstream state to prohibit upstream development, but to pursue such water quality issues through interstate compacts, the negotiation of which can include all affected and interested states on a river system.

The use of interstate compacts has long been favored over protracted litigation among sovereign states. As this Court said in *Colorado v. Kansas*, 320 U.S. 383, 392 (1943), dealing with the apportionment of the use of water quantity by each state:

> The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions,

> necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.

In the various Western water quantity apportionment cases before this Court,[9] the Court has recognized a preference for resolving interstate water allocation matters by agreement or compact whenever possible to avoid time-consuming litigation. As this Court is well aware from these cases, such litigation among two or more states over technical matters can require many years of evidentiary trial. The allocation of water quality assimilative capacity is very similar to allocation of water quantity in that it requires a basin-wide cooperative and equitable distribution to ensure that each state maintains a reasonable balance of power and equitable use of common natural resources. Judicial economy is not served by invoking this Court's original jurisdiction to resolve highly technical matters which can only be addressed by cooperative compromise. Many water quantity compacts have been entered into voluntarily in lieu of protracted original jurisdiction litigation. However, in the water quality area, the states are also

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[9] *See, e.g., Colorado v. Kansas*, 320 U.S. 383 (1943); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Arizona v. California*, 373 U.S. 546 (1963).

subject to Congressional direction[10] to cooperate in resolving disagreements which has never been present in the water quantity disputes.

Without the equitable allocation of water quantities among states on the various Western rivers, accomplished by compact or judicial decree, each state downstream of Colorado would have been compelled to participate in the litigation of each and every water rights application filed in Colorado on a given river system. The burden this would have placed on the downstream states, as well as on the individual water rights applicants and the State of Colorado, is unfathomable. The situation presented by the Tenth Circuit's ruling is likewise unfathomable. Just as water quantity has been addressed by multi-state agreements and compacts, so must the broad issues of water quality be determined rather than by piecemeal process, permit by permit, and rulemaking by rulemaking.

That such cooperation and collaboration can occur and is a suitable way to deal with water quality issues affecting all states in a stream basin is clear from the results of the Colorado River Basin salinity agreements. The history of the issue and its resolution is well documented by the United States Court of Appeals for the District of Columbia Circuit in *EDF v. Costle*, 657 F.2d 275 (1981).

Without reiterating all of the Court of Appeals' discussion in that case, suffice it to say that salinity as an interstate pollution issue would be virtually impossible to

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[10] CWA § 103.

resolve without the basin-wide approach adopted by the seven basin states and embraced by Congress in the Colorado River Basin Salinity Control Act.[11] The alternative to this basin-wide approach under the Tenth Circuit's scheme of things would be for each state downstream of Colorado to protest, litigate and prohibit all discharges and water diversions in the name of complying with state and federal water quality standards for salinity.

The special significance of § 103(b) of the CWA should not be overlooked. Article I, Section 10, Clause 3 of the United States Constitution prohibits a state from entering into any agreement or compact with one or more other states without consent from Congress.[12] Section 103(b) provides express consent from Congress for the states to proceed by compact to resolve interstate water quality issues and demonstrates the recognition of Congress that such matters are not otherwise appropriately resolved within the statute, and need to be addressed in a broader forum than the statutory permitting process.

II. THE CWA DOES NOT GIVE DOWNSTREAM STATES ABSOLUTE VETO POWER OVER UPSTREAM DISCHARGES

The Tenth Circuit has strained reasonable interpretation of the CWA to arrive at what is essentially a

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[11] Colorado River Basin Salinity Control Act, 43 U.S.C. §§ 1571-1599.

[12] "No state shall, without consent of Congress . . . enter into any Agreement or Compact with another State. . . ." U.S. Const. art. I, § 10, cl. 3.

veto power by downstream states over discharges in upstream states. Neither the statutory language nor the intent of Congress support this result, and in fact, in light of § 103 which favors negotiation of interstate compacts, this result upsets and disturbs the balance of power established by Congress in water quality matters.

By ruling that EPA has no discretion in applying the water quality standards of a downstream state to an upstream state discharge permit, and by holding that application of the downstream water quality standards, such as the antidegradation standard of Oklahoma, prevents issuance of any discharge permit, the Tenth Circuit has ignored the remedy selected by Congress to deal with interstate water quality issues and has instead attempted to vest control of upstream development and economic activity with the downstream state. Such a result ignores the fundamental premise of the union of sovereign states and the respective equality of each state within that union.

To reach this result the Tenth Circuit has discarded the well reasoned logic enunciated by this Court in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), wherein the Court determined that it is not proper or permissible for a state to impose its state water quality standards upon a discharger of another state. The Tenth Circuit did this in part by determining that state water quality standards, once approved by EPA, become federal law or regulation. This logic is faulty for several reasons.

First, virtually all state water quality standards, which are implemented through discharge permits as effluent limitations, are approved by EPA. State standards are to be automatically approved by EPA, pursuant to § 303(c), if

they meet the federal CWA standards. Moreover, § 510 provides that EPA must approve state standards that are more stringent than the federal standards. Thus, any downstream state can adopt an antidegradation or other no-discharge water quality standard more stringent than required by the CWA, which must be approved by EPA without discretion and without consideration or balancing of the impact to upstream states.

The Tenth Circuit has also missed the distinction between EPA "approved" and EPA "promulgated" water quality standards. Simple approval by EPA does not give state standards any federal status.[13] When EPA promulgates standards or regulations for national application, it is subject to certain procedural requirements, including publishing notice of the proposed regulation for public review and comment.[14] If these procedures ensuring due process to affected persons and states are not followed, the regulation is subject to judicial reversal.[15] State promulgated standards are not subject to the same national notice and comment requirements, thus there is no due process afforded interested and affected persons or states outside the borders of the promulgating state. Neither is

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[13] Decision of the General Counsel No. 58 (EPA, March 29, 1977), *Memorandum: Revision of Water Quality Standards and Implementation Plans Under § 303 of the Federal Water Pollution Control Act*; *United States Steel Corp. v. Train*, 556 F.2d 822, 837 (7th Cir.) ("the standards are state, not federal regulations"); *Homestake Mining Co. v. EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979).

[14] Administrative Procedure Act, 5 U.S.C. § 553.

[15] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

the EPA approval process contemplated by §§ 303(c) and 510 subject to the procedural and substantive due process requirements otherwise imposed upon federal regulations. In short, the Tenth Circuit has tried to accomplish, by declaring state water quality standards approved by EPA to have the force and effect of federal regulation, what EPA could not have done itself in promulgating federal standards.

As a practical matter, should the Court uphold the Tenth Circuit ruling, Colorado and its permittees would have no choice but to become involved in every standard setting proceeding in each of the states which are downstream to Colorado. This is impractical and unwarranted. Colorado has some 900 discharge permits, including approximately 400 domestic facilities and 500 industrial facilities. To suggest that each of them participate in every rulemaking proceeding of every downstream state to ensure fair and accurate water quality standards in each of those states is ludicrous. Five downstream states directly border Colorado and another 13 downstream states could have equally significant impacts on Colorado water quality standards and discharge permits. In addition, a presently undetermined number of Indian tribes are expected to assert authority under the CWA to promulgate water quality standards with the same force and effect as state water quality standards.[16]

Consider as well, that if one or more downstream state(s) objected to even ten percent of these permits, so that each of those ninety had to be litigated in the federal

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[16] CWA § 518(e).

courts, multiplied by the number of upstream/downstream combinations, these matters would hopelessly clog the federal judicial calendar.

The fact that these examples are so ludicrous explains why Congress did not have in mind that states and permittees should have to participate in water quality standards setting in each state, or that constant litigation under § 402 of the CWA was the solution to interstate water quality matters.

Section 402 of the CWA clearly sets forth the procedure for issuance of discharge permits within each state. An opportunity for comment by another state is accorded. Once a decision to issue a permit is made, the statute provides that EPA is the final arbiter of whether the permit should issue, based upon a consideration of whether actual injury will result.

Matters such as waste load allocation for an interstate river where the maximum pollutant level exists are not provided for in § 303(d) but can be addressed in the context of an interstate compact. This is how EPA should have directed the controversy over the Fayetteville permit under the directive to EPA in § 103.

Section 103(a) requires EPA to encourage cooperation among the states and requires EPA to suggest resolution of problems such as those raised by Oklahoma by interstate compact. The obvious intent of Congress is that the interstate compact process is the only reasonable means of bringing together all the interested and potentially affected states on a stream or river system to allocate waste loads,

just as they allocate water quantity use allocations through such compacts.

III. INTERSTATE COMMERCE MAY NOT BE PROHIBITED BY STATE WATER QUALITY STANDARDS.

To follow the Tenth Circuit logic means that if any one or all of the states downstream from Colorado were to promulgate an antidegradation standard such as that of Oklahoma, Colorado would not be able to permit any more discharges in the state, thus placing the state in an untenable economic posture. Colorado believes this result constitutes an impermissible burden on interstate commerce.

The "dormant" commerce clause[17] has been used in discussions of state limitations on the transport of solid and hazardous wastes. This Court in *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), recognized that the need for national regulation and state cooperation in resolving interstate differences regarding the disposal of solid and hazardous wastes outweighed state interests in limiting acceptance of such wastes.

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[17] The implied limitation on state power recognized in the Commerce Clause has been referred to as the "dormant" or "negative" component of Congress's commerce power. *See generally Huron Portland Cement Co. v. Detroit*, 406 U.S. 170 (1960); *Browning-Ferris Inc. v. Anne Arundel County*, 292 Md. 136, 438 A.2d 269, 3 ERC 1712 (Md. Ct. App. 1980).

The Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, empowers Congress "[t]o regulate Commerce . . . among the several states."

> In terms, the Clause is a grant of authority to Congress, not an explicit limitation on the power of the states. In a long line of cases stretching back to the early days of the republic, however . . . [the United States Supreme Court has] recognized that the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce.

Western & So. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652 (1981). As this Court has recognized, the scope of Congress's commerce power is vast.[18]

Indeed, in the absence of congressional action, the dormant Commerce Clause may be invoked by courts to determine whether state regulations impermissibly burden interstate commerce.[19]

As early as the case of *Gibbons v. Ogden*, 22 U.S. 1 (1824), this Court held that "the power to regulate commerce comprehends the control . . . of all navigable waters and includes . . . the power to keep them open and free from any obstructions."

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[18] *See Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

[19] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

> The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a state other than in which they lie. For this purpose, they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction from their navigation interposed by the states, or otherwise; to remove obstructions where they exist; and to provide, by such sanction as is deemed proper, against the incurrence of the evil, and for punishment of the offenders.

United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 59 (1913).[20]

In the Clean Water Act, however, Congress has spoken clearly on the subject of maintaining quality of this country's waters, and has provided direction in § 103 for the resolution of interstate water quality issues. By acting within the scope of its commerce power to regulate the quality of waters of the United States, it has superseded all state or local action that conflicts with it, including state regulations which are inconsistent with or discourage conduct the CWA is designed to foster.

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[20] *See also South Carolina v. Georgia*, 93 U.S. 4 (1876); *Wisconsin v. Duluth*, 96 U.S. 379 (1877); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *First Iowa Hydro-Elec. Co-Op v. Federal Power Comm.*, 328 U.S. 152 (1946); *Arizona v. California*, 373 U.S. 546 (1963); *Sporhase v. Nebraska Ex. Rel. Douglas*, 458 U.S. 941 (1982).

What could create more of an impermissible burden on interstate commerce than for a downstream state to promulgate and impose water quality standards which ban all new discharges upstream?

CONCLUSION

The State of Colorado urges this Court to carefully consider the broad and untenable ramifications which the Tenth Circuit's ruling has on the implementation of the goals and concepts of the Clean Water Act throughout this nation. The State of Colorado respectfully submits that this Court must reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A